Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-3991

JOSEPH MAYSE and THOMAS MAYSE
Petitioners,

vs.

THE UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. ————————

JOSEPH MAYSE and THOMAS MAYSE

Petitioners,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Orders of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 18, 1974, and July 26, 1974.

CITATIONS OF OPINIONS BELOW

The opinion of the District Court finding the Petitioner JOSEPH MAYSE Guilty and sentencing him to two (2) years probation, the first six (6) months in prison confinement, and the Petitioner THOMAS MAYSE to three (3) years imprisonment October 23, 1973.

JURISDICTION

The final Order of the Court of Appeals was entered July 26, 1974. Motion for Extension of time to file Petition for Certiorari was received by the Court untimely and returned to Petitioners' counsel. The jurisdiction of this Court is invoked under 28 USC, Sec. 1254 (1).

STATEMENT OF QUESTIONS INVOLVED

1. Where the Circuit Court of Appeals has failed to express its position on the significance of Rule 32 (a) (1) and (2) of the Federal Rules of Criminal Procedure and its applicability to District Courts in imposing sentences on convicted defendants, should this Court in the exercise of its supervisory authority clarify and explain the mandates of said rules and their applicability to all inferior Courts?

2. Where the Court of Appeals declines to express an Opinion on a legal issue affecting the Defendant's Fourteenth Amendment Right to a Fair Trial, whereas the exact factual question has never confronted or been decided by the Court; however, other Circuits have established precedent on said issue, should this Court establish precedent on said issue to be binding on all Circuits throughout this Country?

3. Where defendants are charged in an Indictment with having sold altered coins to specific persons in violation of 18 USC 331 and 2 (a), is proof of mere possession of altered coins sufficient to support a conviction for sale?

STATEMENT OF THE CASE

The Indictment in this cause charged the defendant-appellants, THOMAS MAYSE and JOSEPH MAYSE, with several violations of Sections 371, 331 and 2 (a) of Title 18, United States Code (App. 1, 2).

The defendants were arraigned on a Complaint June 12, 1970. They were subsequently arraigned on an Indictment in February 1971. Trial commenced June 6, 1973. There was a substitution of defense counsel at arraignment on the Indictment.

The Indictment charged as follows:

Count I	Fraudulent possession of thirty (30) altered coins June 3, 1970 by both defendants. Viol. 18 USC 331, and 2 (a).
Count II	Sale of One (1) altered coin to Bonnie Mason June 3, 1970 by both defendants. Viol. 18 USC 331, and 2(a).
Count III	Possession of Eighty nine (89) altered coins June 11, 1970 by both defendants. Viol. 18 USC 331 and 2 (a).
Count IV	Sale of five (5) altered coins to Loren Bates June 11, 1970 by both defendants. Viol. 18 USC 331 and 2 (a).
Count V	Conspiracy by both defendants June 1, 1970. Viol. 18 USC 371.

The Government's proofs showed that on June 1, 1970, the Complainant, Bonnie Mason, went to Coin Shop in Detroit, Michigan. The defendants were already there, engaged in business and conversation with the shop owner when she arrived. Defendants introduced themselves to her and thereafter defendant JOSEPH MAYSE left the shop with defendant THOMAS MAYSE remaining.

In the absence of Joseph, Thomas initiated a conversation with Bonnie Mason to determine her interest in purchasing coins. After finishing her business inside the shop, Bonnie Mason met with the defendants outside to discuss possible purchase of coins Thomas said he had. Thereafter, they went inside a bar and Thomas showed her a 1909

penny and an 1889 Carson City minted silver dollar. She was allowed to take the penny home to show to her husband. There were no restrictions imposed on her possession of the coins, or who she could show them to.

Mrs. Mason showed the coins to several long-time coin collectors who examined them and found nothing wrong with them. She went back to the coin shop in Detroit to trade some of the coins purchased from the defendant and became suspicious that the coins might be altered.

Mrs. Mason contacted the Secret Service, and Agent Bates examined the coins and concluded they were altered. Agent Bates arranged with Mrs. Mason to meet with the defendants in an undercover capacity at a prescheduled meeting to see additional coins.

Agent Bates examined a group of coins that were part of a scheduled TEN THOUSAND ($10,000) DOLLAR purchase. He took no money to make a purchase. The plan was to examine the coins, signal the rest of his crew to some in and make the seizure.

The crew impounded the car, and made a seizure of additional articles from the trunk which were received in evidence at the trial over objection.

During trial, Government Exhibits 13 A-21 were received over defense objections. Exhibit 19 was a constitutional rights form, which was offered to support the Government's claim that the defendant THOMAS MAYSE had consented to a search of his home in Coldwater, Michigan, about 112 miles from Detroit. Articles seized from said defendant's home were brought into the courtroom before the jury but were subsequently excluded from evidence when the Government failed to prove that THOMAS MAYSE was advised of his constitutional rights before consenting to the search.

After two (2) days of trial, Government counsel advised that he was bringing in witnesses from Florida and West Virginia to show that the defendant THOMAS MAYSE was involved in a like transaction four (4) years before in Florida. Over vehement objections of defense counsel, the court allowed the proofs to show prior similar acts, and instructed the jury that the proofs were only admissible against THOMAS MAYSE (T. 165-166).

After the Government rested its case, defense counsel moved for directed verdict of acquittal on Counts 2, 4 and 5 for both defendants, and on all Counts for the defendant JOSEPH MAYSE. The court granted the motion as to Count 5 but denied them as to all other Counts. (T. 224-240).

The jury returned a verdict of guilty against both defendants on all four (4) remaining counts.

More than four (4) month later the court proceeded to sentence the defendants over defense objection predicated on the delay in sentencing. The court sentenced THOMAS MAYSE to three (3) years imprisonment without specifying what counts sentence was imposed upon (App. 10-11). The court sentenced JOSEPH MAYSE to two (2) years probation with the first six (6) months in prison confinement (App. 9-10).

The Court of Appeals for the Sixth Circuit heard arguments on the Appeal June 11, 1974 and affirmed the decision of the trial Court via Per Curiam Order June 18, 1974. Petitioners' Motion for Rehearing and request for written opinion, likewise was denied via Per Curiam Order July 26, 1974.

REASONS FOR GRANTING THE WRIT

1. Where the Circuit Court of Appeals has failed to express its position on the significance of Rule 32(a) (1) and (2) of the Federal Rules of Criminal Procedure and its applicability to District Courts in imposing sentences on convicted defendants, this Court should exercise its supervisory authority to clarify and explain the mandates of said rules and their applicability to all inferior Courts.

This argument can commence with the well known adage, "Charity begins at home and spreads abroad." In other words, respect for the law must begin with the Court

The instant argument addresses itself to a "threefold" violation of Rules 32(a) (1) and (2) of the Federal Rules of Criminal Procedure by the trial Court without justification or excuse. Said rule states in part as follows:

> "Sentence *shall* be imposed without unreasonable delay, and *the Court shall advise the defendant* of his right to appeal." (Emphasis Added)

We note that the word "shall" has been consistently construed by appellate courts to mean "mandatory" and not merely "directory."

The facts herein presented for review involves undisputed breach of the Court Rules by the trial Court. There can be no dispute of our claim that the Petitioners were not sentenced for more than four months after Jury Verdict of Guilty and no reason for the delay was offered. Defense counsel objected to the Court passing sentence because of the delay. (See T. 360, 365)

Moreover, upon request of the prosecution, the Court flatly refused to advise Petitioners of their appellate rights; saying: "the defendants have retained counsel." (See T. 363)

The classical question we propose is, can our Appellate Courts ignore such flagrant abuses of unambiguous Court Rules and disconcern for legal precedent in the wake of continuing cries from governments to the general public to respect law and order?

The proffered infraction may seem trivial or excusable, for as the Government argues, no real prejudice or harm was suffered by the Petitioners. However, that is not the criteria upon which Court Rules and legal precedent are founded. If such were the case, then every appeal would be resolved by a balancing of the equities as opposed to adherence to the rule of law. (See *Elkins* v. *United States,* 364 U.S. 206, 80 S. Ct. 1437)

In the instant case, the Sixth Circuit Court of Appeals "Affirmed" the actions of the trial Court by Per Curiam Order without stating whether they believed the trial Court was wrong for doing wrong. Moreover, they do not say the trial Court was correct and explain why. Accordingly, it appears that the Court is condoning an obvious wrong by omission.

We revert back to the spirit of the adage, respect for the law must begin with the Court and spread out into our communities. (See *Mooney* v. *Holohan,* 294 U.S. 103)

In *Welsh* v. *United States,* 348 F. 2d 885, 886, 887, 6th Circuit (1965), the same Court speaking of the issue of delay in sentencing said: "the delay in imposing sentence *must not* be *purposeful* or *oppressive.* Whether a speedy trial is denied depends on the facts and circumstances of the particular case." In *Welsh,* good cause was shown to justify the delay, in that, sentencing was held up until after the defendant had testified for the government in exchange for a promise of leniency.

Government counsel seeks to vindicate the delay in sentencing herein by showing that Courts have held two and three years delay in sentencing not to be unreasonable. He argues that since our delay only involves four months, that is per se a reasonable time within which to impose sentence. Obviously, counsel has misunderstood the cases he cites, because they clearly say that *good cause must be shown* for the delay and the period of time involved is not the controlling factor. (See *Welsh* v. *United States*, supra.) Moreover, in *United States* v. *Strunk*, 467 F. 2d 969 (1972), the Court decided that the totality of facts surrounding a ten (10) month delay from arraignment to trial was a denial of a speedy trial. On the other hand, many Courts have decided that 5 and 6 years was not unreasonable, because the particular facts of each case. Therefore, if there is any delay, good cause therefore *must be shown;* otherwise, a speedy trial has been denied. (See *Welsh* v. *United States*, supra.)

Furthermore, the delay in sentencing in the instant case is aggravated by the fact that there was a delay of eight (8) months from arrest to arraignment on the indictment, and more than three years delay from the original arraignment on the Complaint to trial. No reasons have been offered for these delays.

Each petitioner herein was convicted on four Counts of the Indictment. The trial Court pronounced a "General" sentence as to each Petitioner without specifying to what Count said sentences are to apply.

The question of "blanket" or "general" sentences, where an accused is convicted of multiple Counts in an Indictment, has been considered by the Sixth Circuit Court of Appeals on at least two occasions. In *Davis* v. *United States*, 269 F. 2d 357, 363 and again in *United States* v. *Yoppolo*, 435 F. 2d 625 (6th Cir. 1970) In each instance,

the Court clearly expressed disapproval of "general" sentences. As a matter of fact, Judge Weick, one of the panelists in the instant case said in *Yoppolo* at page 627: "We do not approve of it." Yet, more than three years later, the same Court continues to "Affirm" the District Court in the face of such a patent infirmity.

Indeed, if the Court would once speak and express its position, pro or con, many unnecessary appeals could be eliminated. As long as the law remains in a quandry as it is, then neither the trial Court or an aggrieved defendant can predict what the appellate Court might do; thereby, an appeal becomes imminent.

General sentences on multiple-count convictions are confusing for Appellate Review, because assuming "arguendo" as in the instant case the Court of Appeals had decided that the Petitioners were improperly convicted on the first three of the four counts, how can it be rightfully said that the District Judge meant for the time to be served on the remaining Count, since he did not specify that it was to be served on any particular Count. A strong argument can be offered to support a claim that the sentence was applicable to the first Count and if it's subsequently dismissed, the defendant is entitled to be discharged. Suppose the sentencing Judge dies in the interim, who can definitely say what he meant by the "general" sentence? It is arguable that he meant to suspend sentence on all but one Count.

Government counsel answers the final phase of our argument on this issue by suggesting that the rule does not require the Court to advise defendants of their appellate rights where retained counsel is involved. Counsel is clearly mistaken. As a matter of fact, it was he who requested that the Court advise the defendants of their appellate rights. (T. 363) Obviously, counsel was aware

of the existing rule at the time. Moreover, the very amendment counsel cites on 23 of his brief, clearly states that the Court is *required* to advise *the defendant* of his right to appeal in *all* cases which have gone to trial after a plea of not guilty.

Neither the rule nor the amendment and advisory committee's notes exclude defendants with retained counsel. As the committee notes point out, there are situations where a defendant represented by counsel at the trial may not be adequately advised of his right to appeal.

Finally, Government counsel argues that since the defendants appealed, they must have been advised of their right to appeal. The same could be said about the multitude of cases coming before the courts on this issue. Somebody down the line must have told the defendant. Nevertheless, this should not excuse the District Judge from doing what the Court Rules say he *must* do. The end does not necessarily justify the means.

Government counsel suggests that all the defendants are entitled to is resentencing and he can see nothing to be gained by it. Of course, as an Officer of the Court and an advocate, I am concerned about the Court's respecting the law, even though my clients cannot benefit from it.

Accordingly, we are asking this Court to reconsider the merit of this argument.

2. Where the Court of Appeals declines to express an Opinion on a legal issue affecting the defendants' Fourteenth Amendment Right to a Fair Trial, whereas the exact factual question has never confronted or been decided by the particular Appellate Court; however, other Circuits have established precedent on said issue, this Court should establish precedent on said issue to be binding on all Circuits throughout this Country.

DID THE DEFENDANTS HAVE A FAIR TRIAL

The Order of the Court of Appeals concludes that the Court finds no constitutional rights have been violated. The Court's attention was focused on the District Judge allowing into evidence proof that the Defendant, Thomas Mayse, had committed a similar offense in Florida four (4) years before. This evidence was allowed in the Government's case in chief and not as rebuttal. Moreover, the defense had no opportunity to discover this evidence in advance of trial so as to be prepared to meet it.

We are asking this Court to consider this argument, because even at this juncture, the defendant, Thomas Mayse, is presumed to be innocent of that offense in Florida until he is charged and proven to be guilty beyond a reasonable doubt. However, Government Counsel was permitted to argue before the jury, as he does on page 7 of his brief, that Thomas Mayse COMMITTED the exact crime in Florida that he committed in Michigan.

This Court should consider the questioned evidence as it affects the *fairness* of the trial. Defense counsel met with Government counsel in his office several months before trial and discussed what proofs the Government would present at trial. Then in the midst of trial, Government Counsel discovers another incident involving *one* of the

defendants, wherein no criminal charges were brought, and immediately, counsel has to defend against a second case *totally* unprepared.

This Court has refused to follow the 9th and 10th Circuits on this very issue. In *Davis* v. *United States*, 370 F. 2d 210 (9th Cir.), the Government was prosecuting the defendant for driving a stolen car across state lines. The trial Court allowed the Government to introduce in its case "in chief" that the defendant had been convicted of "auto theft" several years before, on the theory that such proof was relevant to show intent or lack of mistake. The Court held this to be reversible error.

Contrary to Government Counsel's argument, *Davis* can only be distinguished from the instant case in that it is stronger in favor of the argument we make than the case cited, because in *Davis* the prior similar act was a conviction while in the instant case, the prior similar acts are not even a formal accusation.

Again, in *Mills* v. *United States*, 367 F. 2d 366 (10th Cir.), the Court considering the admissibility of a prior similar act held: that it was error to permit the Government to show as part of its *case in chief* other similar acts on the theory that these proofs are probative to show scheme, design and course of conduct.

Government counsel has not produced one (1) case from this Circuit ruling contrary to the above cited cases. Every case Government Counsel cites is distinguishable on the facts or inapplicable. For example, he cites *Luck* v. *United States*, 348 F. 2d 763 (D.C. Cir.), as authority; however, defendant's conviction was reversed in said case. Moreover, counsel cites *United States* v. *Sheiner*, 410 F. 2d 357, which not only does not stand for the position he argues, but in addition, is improperly cited.

In conclusion, it was wholly improper for the Court

to allow Government Counsel to present proofs of the Florida incident in his *case in chief*. While we have some doubt about the admissibility of such evidence as proper "Rebuttal" evidence once the defendant takes the stand and says that he was entrapped, acted in good faith, mistaken etc., we have no doubt that such evidence is inadmissible to prove the crime charged. The orderly presentment of the proofs affects the fairness of the trial. *People* v. *Quick*, 58 Mich.

Defense counsel proceeded to represent both defendants assuming that the Government's proofs against the defendants consisted of their concerted efforts in the sales of altered coins allegedly made in the Eastern District of Michigan.

Knowledge of the Government's intent to bring in proofs of other similar acts against one defendant was imperative to properly advising both defendants pre-trial. This counsel could not effectively do so, since he had no way of knowing or discovering evidence the Government itself was unaware of and had no intent to use.

Certainly, a separate trial for the defendant JOSEPH MAYSE was in order and would have been requested had there been any knowledge of this most damaging evidence against the co-defendant. Although the court instructed the jury not to consider the evidence against JOSEPH MAYSE, one cannot expect the jury to erase such evidence from their minds as if it were never heard. (*Burton* v. *United States*, 391 US 123; *People* v. *Ramsey*, 385 Mich. 221) Moreover, the jury would be more likely to consider this evidence in weighing the relationship of the parties, as one of the witnesses testified the defendants said they owned a coin shop in Florida. (T. 40)

Once the evidence of similar acts was admitted against one of the defendants, counsel could not and did not ade-

quately represent either or both defendants. Counsel was halted between two opinions, in that, he had to argue and develop proofs that would not offend the defense of either accused. Accordingly, 100% assistance could not be given to either in this sort of situation.

Courts generally frown on one lawyer representing multiple defendants, suggesting that a conflict of interest is normally involved. (See *Glasser* v. *United States*, 315 US 60 (1942); *Beasley* v. *United States* (6th Cir., decided February 1, 1974; Docket No. 73-1351).

Likewise, the defendant JOSEPH MAYSE was prejudiced by the alleged consent to search the home of THOMAS MAYSE. (See *Delli Paoli* v. *United States*, 352 US 232, 247, 77 S. Ct. 294, 302, 1 L. Ed. 2d 278)

Although that evidence was eventually excluded by the Court, not before the jury had a chance to see it in court and hear Bonnie Mason testify about it and its presence. (T. 212, 219)

Finally, in closing arguments, counsel found it almost impossible to argue effectively for one defendant without offending the defense of the other.

In view of the foregoing, a new trial should be granted both defendants separately.

3. Where defendants are charged in an Indictment with having sold altered coins to specific persons in violation of 18 USC 331 and 2(a), mere proof of possession of altered coins will not support a conviction of sale pursuant to the Indictment.

After the Government rested its case (T. 224), defense counsel moved for directed verdict on Counts 2 and 4 as to both defendants, and as to all counts against the defendant JOSEPH MAYSE. These motions were denied; however, the court granted a directed verdict as to Count 5 charging a conspiracy (T. 237).

Count 2 of the Indictment charged a sale of an altered 1889 silver dollar to Bonnie Mason June 3, 1970 in violation of Sections 331 and 2(a), Title 18 USC. The undisputed evidence was that THOMAS MAYSE entrusted the silver dollar to Bonnie Mason on that date to examine, to see if she wanted to buy it. Thomas said he was broke and borrowed SEVENTY FIVE ($75.00) DOLLARS toward an anticipated future purchase. (T. 43, 250, 251) Accordingly, there was no sale as charged, and the Government failed to sustain its burden of proof on said Count. Moreover, the evidence failed to show any participation in said transaction by the defendant JOSEPH MAYSE at all.

Count 4 charged a sale of altered coins to Loren Bates on June 11, 1970 in violation of Sections 331 and 2(a), Title 18, USC. The undisputed evidence was that Agent Bates *never intended to purchase* any coins and took no money with him for that purpose. He set up a trap to apprehend the defendants in possession of the coins. No money ever exchanged hands and there was no meeting of the minds between the parties. (T. 84, 109)

A sale involves a meeting of minds, a contractual relationship between parties. It involves an offer and acceptance, acceptance by payment for the article purchased. In the instant case, a purchase was not even intended; therefore, no sale could be involved. The Government cannot convert a mere seizure from possession to a sale to fit the charges imposed. The Government failed to sustain its burden of proof on this count.

The court's refusal to dismiss all counts as to JOSEPH MAYSE was clear error. The total proofs clearly showed that said defendant was merely present during the alleged transactions and had little, if anything, to say. Bonnie Mason construed his presence as being a "yes man" (T. 49, 219, 221). Loren Bates was in error as to which defendant was whom; accordingly, his testimony is not helpful on the respective participation of the parties.

The law is well settled that mere presence affords no basis for a conviction. *Baker* v. *United States*, 395 F. 2d 368.

Moreover, the defendant JOSEPH MAYSE was not properly charged in the indictment as an aider and abettor. This fact was clearly recognized by the court (T. 229). However, the motion for directed verdict was denied. These errors necessitate a new trial. *United States* v. *Collon*, 426 F. 2d 939.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

For The

EASTERN DISTRICT OF MICHIGAN –
SOUTHERN DIVISION

No. 45504

UNITED STATES OF AMERICA

v.

JOSEPH MAYSE

JUDGMENT AND COMMITMENT

(Filed October 24, 1973)

On this 23rd day of October, 1973 came the attorney for the government and the defendant appeared in person and by counsel, Wilfred C. Rice.

IT IS ADJUDGED that the defendant upon his plea of not guilty and verdict of guilty has been convicted of the offense of possession and passing altered coins; in violation of Sections 331 and 2(a), Title 18, U.S.C., as charged in Counts 1, 2, 3, & 4 of the Ind., and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no suf-

ficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months.

It is Adjudged that the defendant be placed on probation for a period of eighteen (18) months following his service of the six (6) months sentence.

The defendant's appearance bond in the amount of $2,500.00 Cash or Surety is hereby cancelled. Appeal bond is set in the amount of $2,500.00 Cash of Surety with a 10% provision.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the U.S. Attorney — Approved as to form.

THOMAS P. THORNTON
United States District Judge.

The Court recommends commitment to

. . . . . .

Clerk

A True Copy. Certified this 23rd day of October 1973

(By) /s/ KATHLEEN GRUBER
Deputy Clerk

UNITED STATES DISTRICT COURT

For The

EASTERN DISTRICT OF MICHIGAN –
SOUTHERN DIVISION

No. 45504

UNITED STATES OF AMERICA

v.

THOMAS MAYSE

JUDGMENT AND COMMITMENT

(Filed October 24, 1973)

On this 23rd day of October, 1973 came the attorney for the government and the defendant appeared in person and by counsel, Wilfred C. Rice.

IT IS ADJUDGED that the defendant upon his plea of not guilty and verdict of guilty has been convicted of the offense of possession and passing altered coins; in violation of Sections 331 and 2(a), Title 18, U.S.C., as charged in Counts 1, 2, 3, & 4 of the Ind., and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby com-

mitted to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years.

Defendant's $15,000.00 Cash or Surety bond is continued pending appeal.

IT IS ADJUDGED that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form: Asst. U.S. Attorney

THOMAS P. THORNTON
United States District Judge

The Court recommends
commitment to

A True Copy. Certified this 23rd day of October 1973

(Bv) /s/ KATHLEEN GRUBER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-2240

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

JOSEPH MAYSE and THOMAS MAYSE
Defendants-Appellants.

ORDER

(Filed June 18, 1974)

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

Appellants were convicted by a jury of four counts of possession and sale of United States coins, in violation of 18 U.S.C. §§ 2 (a) and 331. On appeal from that conviction, their main contention is that the District Court improperly permitted the introduction of evidence relating to prior similar acts of Appellant Thomas Mayse four years prior to the trial.

Having considered the briefs and the record and upon hearing oral arguments, the Court finds that no constitutional rights of Appellants have been violated and that no reversible error has occurred. Therefore, it is ORDERED that the judgment of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-2240

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH MAYSE and THOMAS MAYSE,
Defendants-Appellants.

ORDER

(Filed July 26, 1974)

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

Appellants having field a petition for rehearing and request for written opinion with this Court, and this Court having considered said petition and being duly advised in the premises,

It is ORDERED that the petition for rehearing and request for written opinion be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-399

JOSEPH MAYSE AND THOMAS MAYSE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the trial court followed improper sentencing procedures; (2) that evidence of a prior similar act was improperly admitted; and (3) that the evidence was insufficient.

Petitioners were convicted in the United States District Court for the Eastern District of Michigan of possessing and selling altered coins, in violation of 18 U.S.C. 331. Thomas Mayse was sentenced to a term of three years' imprisonment; Joseph Mayse was sentenced to a term of six months' imprisonment to be followed by 18 months' probation. The court of appeals affirmed on June 18, 1974, and a petition for rehearing was denied on July 26, 1974 (Pet. App. 5a-6a). The petition for a writ of certiorari was not filed until October 9, 1974, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

On June 1, 1970, Bonnie Mason, a customer in a coin shop, was approached by Thomas Mayse concerning some coins that he wished to sell (Tr. 12-13).[1] A short time later Mason met both petitioners outside the coin shop and was shown a 1909 penny and an 1889 Carson City minted silver dollar (Tr. 14-15). Mrs. Mason expressed interest in making a purchase and took the penny home to show her husband. Subsequently, a meeting was arranged at a nearby bar to discuss the sale of these and other coins. Mrs. Mason testified (Tr. 16):

> We gave them $75.00. I then obtained from Tom the 1889 Carson City silver dollar in Eddie Rhoads Bar. I gave them back the penny.

The following day, petitioners again approached Mrs. Mason and a fellow collector, offering a larger selection of coins for $8,000. When Mrs. Mason and her friend were unable to raise that amount, petitioners dropped the price to $5,000 and a sale was effected (Tr. 21-23). When Mrs. Mason subsequently attempted to trade some of the coins, she discovered that they had been altered and were not genuine (Tr. 23-25).

Mrs. Mason contacted the Secret Service and agreed to arrange a meeting between petitioners and an undercover agent. On June 11, 1970, Mason and Agent Bates met with petitioners, feigning interest in further purchases. Petitioners produced a bag of coins from the trunk of their car and offered to sell a quantity of coins for $10,000. Bates agreed to the sale after unsuccessfully attempting to bargain for a lower price (Tr. 27, 81, 87-99, 101). Bates took possession of the coins, examined and inventoried them, and marked one exceptionally valuable coin for identification (Tr. 79-82).

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[1] "Tr." refers to the transcript of trial proceedings.

Expert testimony established that all of the coins which had been sold to Mrs. Mason and Agent Bates, as well as other coins seized from petitioners' car, had been altered (Tr. 204-209).

At trial, the government presented testimony that Thomas Mayse had engaged in a similar scheme involving altered coins in 1969 (Tr. 165-166). The evidence was admitted as probative of Thomas Mayse's state of mind and intent (Tr. 330-331). The trial court gave repeated cautionary instructions as to the limited purpose for which the evidence was admitted and admonished the jury to consider the evidence only in respect to Thomas Mayse (Tr. 177-178, 199, 330-331).

Petitioners were convicted on June 8, 1973, and a pre-sentence investigation was ordered (Tr. 345). Sentencing was later scheduled for October 18, then rescheduled for October 23 at the request of defense counsel (Tr. 360-361). At the hearing on sentencing, petitioners, who had not been incarcerated, objected for the first time to the four-month delay in sentencing (Tr. 360, 365).

1. Petitioners claim that the four-month delay between conviction and sentencing, and the trial court's failure to apprise them directly of their right of appeal, contravened the requirements of Rule 32(a), Fed. R. Crim. P. Petitioners concede, however, that no prejudice resulted from the delay in sentencing (Pet. 7). The four-month delay therefore was not "unreasonable" under Rule 32(a). See *Brooks* v. *United States,* 423 F. 2d 1149, 1153 (C.A. 8), certiorari denied, 400 U.S. 872. See, also, *Pollard* v. *United States,* 352 U.S. 354, 361; *Juarez-Casares* v.

United States, 496 F. 2d 190, 192 (C.A. 5). Moreover, even an "unreasonable" delay in sentencing, if not objected to prior to the sentencing hearing, should not be a basis for reversing a conviction. Cf. *Barker* v. *Wingo*, 407 U.S. 514.[2]

Petitioners also contend that the court committed reversible error in failing to apprise them of their right to appeal. However, any error that was committed was rendered harmless by petitioners' timely filing of a notice of appeal and their subsequent prosecution of that appeal. See, *e.g.*, *Chapman* v. *United States*, 469 F.2d 634, 637 (C.A. 5); *Davis* v. *United States*, 464 F.2d 1009, 1013-1014 (C.A. 6); *United States* v. *Chapman*, 448 F.2d 1381 (C.A. 3), certiorari denied *sub nom. Overton* v. *United States*, 405 U.S. 929.[3]

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[2]Petitioners allude to, but fail to raise as error, a delay of over three years between arrest and trial (Pet. 8). Petitioners make no attempt to substantiate a claim of denial of a speedy trial, and the record contains no evidence which would support such an allegation. The court below considered this claim and rejected it without opinion (Pet. App. 6a). Applying the test enunciated by this Court in *Barker* v. *Wingo*, *supra*, petitioners were partially responsible for the delay, with the neutral factor of congested court calendars responsible for the remainder (Tr. 349); petitioners failed to assert their right to a speedy trial; and none of the factors giving rise to prejudice was present. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 532.

[3]Petitioners also allege that the court erred in imposing general sentences. However, their reliance on *United States* v. *Yoppolo*, 435 F. 2d 625, 627 (C.A. 6), and *United States* v. *Davis*, 269 F. 2d 357, 363 (C.A. 6), certiorari denied, 361 U.S. 919, is misplaced. While expressing reservations as to the desirability of the practice, both courts affirmed general sentences where, as here, the sentence did not exceed the maximum that could be imposed on any count. See, also, *United States* v. *Kenny*, 462 F. 2d 1205, 1229-1230 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States*, 409 U.S. 914.

2. Petitioners also contend that the court erred in admitting evidence of Thomas Mayse's prior similar conduct. However, as is specifically acknowledged even in the decisions upon which petitioners rely (*Davis* v. *United States*, 370 F. 2d 310, 312-313 (C.A. 9), and *Mills* v. *United States*, 367 F. 2d 366, 367 (C.A. 10)), the admission of evidence of prior similar acts is appropriate in order to show knowledge, plan, intent, or absence of mistake. See, also, Rule 404(b) of the proposed Rules of Evidence for United States Courts and Magistrates. The prior conduct shown here was probative as to Thomas Mayse's knowledge that the coins had been altered and his fraudulent intent. The evidence was, therefore, properly admitted. See, *e.g.*, *United States* v. *Payne*, 467 F. 2d 828, 831 (C.A. 5), certiorari denied, 410 U.S. 912.[4]

3. Finally, petitioners argue that there was insufficient evidence to support their convictions on the counts alleging the sale of the coins. Count II of the indictment alleges that petitioners sold an 1889 Carson City silver dollar to Mrs. Mason. Mrs. Mason testified that she paid petitioners $75 and received the silver dollar in return. Petitioners' characterization of this transaction as a loan or an advance toward a future purchase is without foundation. There was no evidence of an agreement to repay the money, nor does the record indicate that petitioners expected the coin to be returned.

Court IV alleges that petitioners sold a quantity of coins to Agent Bates. The record indicates that petitioners offered to sell the coins to Bates for $10,000, an offer that he accepted, and that Bates received possession of the coins. From this, the jury properly found "an agree-

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[4]Petitioner Joseph Mayse also alleges that he was prejudiced, in light of this evidence, by a conflict of interest arising from defense counsel's representation of both petitioners. But he did not move to sever, nor did he object at any time to dual representation by retained counsel. It is, moreover, unclear in what way the evidence of Thomas Mayse's prior conduct created any conflict of interest not already inherent in the dual representation to which both petitioners had acceded. See, *e.g.*, *United States* v. *Gallagher*, 437 F. 2d 1191, 1194 (C.A. 7), certiorari denied, 402 U.S. 1009.

ment between parties to give and to pass rights of property for money which the buyer pays or promises to pay to the seller for the things bought or sold" (Jury Instructions, Tr. 329). The fact that the buyer's promise to pay was executory is immaterial. Cf. *United States* v. *Jenkins*, 347 F. 2d 345, 347 (C.A. 4).

Joseph Mayse also claims that there was insufficient evidence to support his conviction on any count of the indictment. However, 18 U.S.C. 2(a) imposes the same liability on a person who aids and abets the commission of a crime as would be imposed on a principal. Mrs. Mason's testimony regarding the events following her initial encounter with Thomas Mayse constantly refers to "them" and "they" when describing her transactions with petitioners. Joseph Mayse also represented to Mrs. Mason, as an inducement to purchase, that Thomas Mayse had been the proprietor of a coin shop that had gone bankrupt (Tr. 49). It was subsequently admitted that that representation was false (Tr. 253-254). Agent Bates' testimony also indicated that both petitioners were involved in the transaction with him *(e.g.*, Tr. 80-81, 108). There was thus sufficient evidence from which the jury could conclude that Joseph Mayse willfully associated himself with the criminal venture and encouraged its success. See *United States* v. *Bryant*, 461 F.2d 912, 919-920 (C.A. 6).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.